



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

May 29, 1995

Mr. John Steiner
Division Chief
Department of Law
City of Austin
P.O. Box 1088
Austin, Texas 78767-1088

OR95-301

Dear Mr. Steiner:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 30504.

The City of Austin has received a request for "the contract for media and Marketing services for the Austin Music Network. [This] request is both for the actual contract and all attachments including the RFP and the response to the RFP." You indicate your understanding that the solicitation material and the standard terms and conditions of the contract are public records, and we trust that you have already made them available to the requestor.¹

Pursuant to section 552.305 of the Government Code, we have notified JRG Associates, the third party whose interests are implicated by this request. JRG, while not identifying an exception under the act, claims that its response to the request for proposal, each page of which is marked "proprietary," is exempt from disclosure. Section 552.110 protects the property interests of private persons by excepting from required public disclosure two types of information: (1) trade secrets and (2) commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision.

¹We note that the request for an open records ruling from the city was submitted by Deputy Attorney Michael Cosentino as the Acting City Attorney.

The Texas Supreme Court has adopted the definition of trade secret from section 757 of the Restatement of Torts. *Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex.), *cert. denied*, 358 U.S. 898 (1958); *see also* Open Records Decision No. 552 (1990) at 2. Section 757 provides that a trade secret is

any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. *It differs from other secret information in a business . . . in that it is not simply information as to single or ephemeral events in the conduct of the business, . . . [but] a process or device for continuous use in the operation of the business* [It may] relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939) (emphasis added). If a governmental body takes no position with regard to the application of the "trade secrets" branch of section 552.110 to requested information, we must accept a private person's claim for exception as valid under that branch if that person establishes a *prima facie* case for exception and no one submits an argument that rebuts the claim as a matter of law. Open Records Decision No. 552 (1990) at 5.²

In response to our notification, JRG has only reiterated the fact that the document was identified as "proprietary" and expressed concern that the requestor would gain unfair advantage from access to it. It is well settled that a unilateral attempt to close documents by identifying them as confidential does not, in fact, make them so.

²The six factors that the Restatement gives as indicia of whether information constitutes a trade secret are

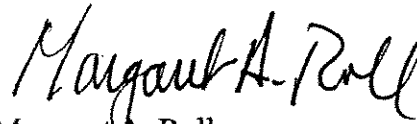
- (1) the extent to which the information is known outside of [the company];
- (2) the extent to which it is known by employees and others involved in [the company's] business;
- (3) the extent of measures taken by [the company] to guard the secrecy of the information;
- (4) the value of the information to [the company] and [its] competitors;
- (5) the amount of effort or money expended by [the company] in developing the information;
- (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

RESTATEMENT OF TORTS, *supra*; *see also* Open Records Decision Nos. 319 (1982) at 2, 306 (1982) at 2, 255 (1980) at 2.

Open Records Decision No. 575 (1990) at 3. We conclude that JRG has not made a prima facie case that the response to the request for proposal constitutes trade secrets. For information to be excepted from required public disclosure as "commercial or financial information" under section 552.110, the information must be privileged or confidential under the common or statutory law of Texas. *See* Open Records Decision No. 592 (1991). The company has not identified either a statute or a judicial decision that would make this information confidential under the commercial and financial information branch of section 552.110, and we are unaware of any that would make it so. *See id.* Accordingly, we conclude that it may not be withheld from required public disclosure under section 552.110 and must be released in its entirety.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination under section 552.301 regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Margaret A. Roll
Assistant Attorney General
Open Government Section

MAR/PIR/rho

Ref.: ID# 30504

Enclosures: Submitted documents

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